

FILED

JUN 26 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

515

STATE OF IOWA,

)

Filed June 26, 1984

Plaintiff-Appellee,

)

vs.

)

4-182
83-563

SCOTT VAN ELSON,

)

Defendant-Appellant.

)

Appeal from the Iowa District Court for Linn County, Robert E. Ford and
August F. Honsell, Judges.

Defendant appeals from his conviction on two counts of theft in the third
degree. **AFFIRMED.**

Charles L. Harrington, Chief Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and John P. Messina, Assistant
Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Schlegel, JJ.

This appeal is from a conviction on two counts of theft in the third degree. Defendant argues on appeal that the trial court erred in overruling his motions to suppress evidence, some of which was seized pursuant to a search warrant, and the rest of which was seized in a subsequent warrantless search. We affirm.

I. Facts

Defendant was formerly an employee of the City of Cedar Rapids Forestry Department. He was fired in December of 1981. On May 9, 1982, Cedar Rapids police applied for a search warrant to search defendant's house for various items which had disappeared from the forestry department. The application contained a statement that two employees of the forestry department had seen some of the missing items in defendant's truck and in defendant's basement. The application also included a contention that these items had disappeared on the date defendant was fired. The warrant was issued, and upon a search of defendant's house, the police found a number of the stolen items.

While engaged in the search, the officers saw other items that they thought might be stolen. They returned to the police department where they checked a report on a month-old burglary at a Cedar Rapids nursery. Several of the items reported missing in that burglary resembled those which they had seen at defendant's house. The officers returned to the house and asked defendant's wife for permission to search the garage. Testimony of the police and defendant's wife is conflicting on the question of whether she voluntarily gave consent. The officer testified that she called her attorney and came back to tell them that the attorney said the search would be "okay." There is no dispute that she signed a form giving the police permission to make the search. Defendant's wife testified that she was unable to get through to her attorney and gave her consent to the search only after the police told her, "If you don't let us in now we are going to return and you are going to have to let us in."

The officers searched the garage and seized a number of items that had been stolen from the nursery. Defendant moved to suppress the items seized both under the warrant and in the warrantless search of the garage. The motion to suppress was denied on grounds that there was probable cause to issue the warrant and that the warrantless search was consensual. The defendant renewed the motion to suppress at trial, contending that testimony at trial showed that the items missing from the forestry department had been reported missing to the police three months before defendant was fired. He asserted that the statement in the search warrant application alleging that the items had disappeared on the date he was fired was incorrect and that there was not probable cause to issue the warrant in the absence of that statement. The court denied the motion. Although the basis for the ruling is unclear, the court implies that the motion was denied because it was untimely.

II. Motion to Suppress Evidence

Defendant's motion to suppress was properly overruled by the trial court. Iowa Rule of Criminal Procedure 10(4), expressly made applicable by Rule 11(1), provides that motions to suppress evidence obtained in an unlawful search and seizure must be filed within forty days after arraignment unless the court extends the filing period for good cause shown. Defendant's arraignment was on May 21, 1982, yet his motion to suppress was not filed until January 10, 1983. Defendant did not request an extension and did not show good cause for his failure to file the motion on time. Defendant's motion was untimely, and his late filing was unexcused. The motion was therefore waived. State v. Beeman, 315 N.W.2d 770, 779 (Iowa 1982).

Concerning the evidence seized in the warrantless search of his garage, defendant argues that any untimeliness in filing a motion to suppress resulted from ineffective assistance of counsel. We will not address that issue at present, since the record on direct appeal is insufficient for such purposes.

AFFIRMED.